In the United States Supreme Court

OCTOBER TERM, 1959

No. 141

MASSEY MOTORS, INC., Petitioner

v.

THE UNITED STATES OF AMERICA, Respondent.

On Writ of Certiorari to the Court of Appeals
for the Fifth Circuit

BRIEF FOR MASSEY MOTORS, INC., PETITIONER

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APPENDIX

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OPINIONS BELOW

The opinion of the United States Court of Appeals (R. 132-144) is reported at 264 F.2d 929. The Findings of Fact and Conclusions of Law, as amended, of the District Court are reported in 156 F.Supp. 516.

JURISDICTION

The judgment of the Court of Appeals was entered on February 26, 1959 (R. 144). On June 24, 1959, an order granting the petition for certiorari was entered, and the case transferred to the summary calendar. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

This income tax case involves a question of the proper definition of the terms "useful life" and "salvage value" for purposes of computing allowances for depreciation under Section 23(1) of the Internal Revenue Code of 1939. The petitioner, a retail automobile dealer, in filing its Federal income tax returns for the calendar years 1950 and 1951 claimed depreciation deductions with respect to certain company and rental cars used by it in the operation of its business, computing such deduction on a straight line method, with a "useful life" of three years, without consideration of any salvage value. The Government contends that the useful life of the vehicles in question is their useful life as shown by the business practices of the petitioner, and not their physical or economic life and that the salvage value of the vehicles is equal to their sales price when removed from service. The petitioner on the other hand contends that the useful life of the cars for purposes of computing an allowance for depreciation for Federal income tax purposes under the Internal Revenue Code of 1939 is the economic or physical life of such vehicles and that the salvage value, if any, properly assignable is the value of the cars at the end of such economic or physical useful life.

Hence, in this case, the Court is called upon to settle the question of the proper definition of the terms "useful life"

and "salvage value" for purposes of computing depreciation deductions under Section 23(1) of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED

Section 23(1) and Section 117(j) of the Internal Revenue Code of 1939 and the relevant portions of Treasury Regulations 111 are set forth in Appendix A, *infra*, pages 36-40.

STATEMENT

The facts involved in this case as found by the Courts below (R. 105-117; 121-124; 132-144) are summarized below.

The petitioner is a Florida corporation with principal office at Jacksonville, Florida, and holds a franchise from Chrysler Corporation for the retail and wholesale sale of Plymouth and Dodge automobiles in Florida and Georgia.

Petitioner owned all of the issued and outstanding capital stock of Atlantic Motor Sales, Inc., a corporation which was located in Jacksonville, and was also a franchised Chrysler dealer handling substantially the same products as those sold by petitioner. For the taxable years in question; namely, the calendar years 1950 and 1951, petitioner and its wholly-owned subsidiary filed a consolidated Federal income tax return.

Petitioner, during the years involved, employed between 85 and 120 persons in the operation of its business. The petitioner also appointed associate dealers under an arrangement whereby merchandise was purchased from Chrysler and, in turn, sold to associate dealers. During the taxable years in question, petitioner had three associate dealers. Petitioner assisted

its associate dealers in promotion work in connection with the sale of Chrysler automobiles, trucks and parts, and in general supervised the operation of its associate dealers in much the same way that Chrysler supervised and directed its own retail dealers.

During the years involved, petitioner's management withdrew certain automobiles from its inventory which were placed in company use.

During the same years, petitioner leased certain automobiles to Atlantic Discount Company, an automobile finance company, at a net rental of 3 cents per mile, payable monthly. During 1950, petitioner had 51 company cars in service, of which 23 were leased to Atlantic Discount Company. The leased cars were used by company personnel of the finance company in the operation of its business.

In 1950, petitioner sold 27 of the 51 company cars in service. During 1951, the petitioner had 53 company cars, of which 26 were leased to Atlantic Discount Company. Petitioner sold 23 of these cars in 1951. Petitioner received rental income in the respective amounts of $5,433.55 and $7,288.22 during 1950 and 1951 from Atlantic Discount Company under the leasing arrangement. Atlantic Discount Company paid all costs of operating and maintaining the leased vehicles, including the cost of all necessary collision and public liability insurance. During the taxable years, petitioner incurred annual expenses of approximately $5,000 to $6,000 in maintaining and operating its company cars.

The petitioner did not drive the new and used cars and trucks it held for retail sales to customers, except for necessary driving for servicing and delivery, and these vehicles

were not registered in its name under the Motor Vehicle Registration laws of the State of Florida.

As a matter of bookkeeping procedure, the petitioner charged all cars and trucks it obtained from Chrysler Corporation into Account No. 131 on its ledger. When any cars or trucks were placed in use or rental service, an entry was made to remove these vehicles from Account No. 131, which was an inventory account, and to place them in the company car Account No. 167, a fixed asset account.

The decision to place cars in company or rental use was made by petitioner's management. As a car was placed in company use, it was covered with fire and theft, comprehensive, public liability and property damage insurance, for the exclusive benefit of petitioner. Regular license plates were procured for each of the cars registered in petitioner's name, and the automobile was paid for in full in cash. Dealer tags were never used on any of the cars employed for company business uses. The company cars were used by various of petitioner's officials and its wholly-owned subsidiary, Atlantic Motor Sales, Inc., in the general course of everyday business, which included, among other things, traveling to and from the various locations maintained by both companies. The cars were also used in making bank deposits, messenger service, trips to postoffice, and for loan to customers in need of transportation. The cars were also used to permit managers and other company personnel to travel for business purposes to cities, such as Atlanta, Georgia, and Tampa, Florida, for new car showings and other type of factory meetings. The cars were also used by the petitioner in its contact with associate dealers and used in various civic functions, such as parades, etc. Petitioner's business could not have operated successfully without the use of the company cars.

Petitioner followed the practice of disposing of all company and rental cars as soon after annual model change as practicable. Petitioner's management deemed it advisable to have the company personnel in current model cars. Petitioner also disposed of its rental cars during any year that a particular unit had run approximately 40,000 miles. Company cars were also removed from service when they had run approximately 10,000 miles, without regard to model change.

Petitioner, in filing its consolidated Federal income tax returns for the calendar years 1950 and 1951 deducted the respective sums of $9,346.69 and $11,572.45 as depreciation on its company cars, including those rented to Atlantic Discount Company. It computed this depreciation on a straight line method utilizing an estimated useful life of 36 months, and no salvage value.

During the calendar year 1950, petitioner sold 27 of the 51 company cars in use and under lease, of which 16 were held less than six months prior to the date of sale. Petitioner reported a short-term capital gain in the amount of $10,247.00 with respect thereto. The remaining eleven cars were held more than six months, and petitioner reported long-term capital gain in the amount of $6,713.21 with respect thereto under the provisions of Section 117(j) of the Internal Revenue Code of 1939. During the calendar year 1951, petitioner sold 23 of the 53 cars in company use and under rental, of which nine were held less than six months. Petitioner reported a short-term capital gain in the amount of $6,760.41 with respect thereto. Of the remaining 14 cars, depreciation and long-term capital gains treatment was allowed by the Commissioner as to two, and they are not here in issue. The remaining 12 cars sold were held for more than six months prior to the date of sale, and petitioner reported long-term capital

gain in the amount of $6,925.97 with respect thereto.

The Commissioner of Internal Revenue in causing petitioner's returns to be audited for the calendar years 1950 and 1951 determined that petitioner was not entitled to any depreciation on the company cars in question on the theory that all of the cars constituted stock in trade and were not therefore subject to an allowance for depreciation, and accordingly, the Commissioner disallowed long-term capital gains treatment under Section 117(j) with respect to the profits realized from the sale of these cars. Following the audit, petitioner paid the resulting deficiencies and interest in full, filed claims for refund within the time prescribed by law, and in due course instituted a suit for refund in the District Court for the Southern District of Florida, Jacksonville Division, seeking an adjudication of its liability for the defeiciencies.

The District Court held that the cars in question were bona fidely used in the operation of the petitioner's trade or business and that, therefore, the gains realized from the sale of the units held for more than six months qualified for long-term capital gains treatment under Section 117(j) of the Internal Revenue Code of 1939.

The District Court also held that petitioner was entitled to the depreciation claimed on its original returns for 1950 and 1951.

Following the decision of the District Court, the Government took an appeal to the Court of Appeals for the Fifth Circuit. The Court of Appeals on February 26, 1959, in a split decision, reversed the District Court on the issue of depreciation and capital gains with respect to petitioner's company and rental cars.

The Court of Appeals, in effect, held that the useful life to be used for purposes of computing deductions for depreciation is the useful life of assets used in trade or business as shown by the trade practices of a particular taxpayer, with salvage value to be calculated at the end of such period, as opposed to utilizing as the useful life the inherent economic or physical life of the asset. The case was remanded to the District Court for a determination of the proper salvage value to be assigned to the vehicles in question.

SUMMARY OF ARGUMENT

The decision of the Fifth Circuit attacked in this Court holds that for Federal income tax purposes in computing deductions for depreciation under Section 23(1) of the 1939 Code, the term "useful life" of a fixed asset used in business means the useful life of the asset in the hands of a particular taxpayer and not its physical or economic life and that "salvage value" must be considered at the end of such period. We submit that the decision is erroneous for the following reasons:

I.

For purposes of computing depreciation with respect to property used in trade or business under Section 23(1) of the Internal Revenue Code of 1939 on the straight line method, the useful life to be used is the physical or economic life of such asset and its salvage value, if any, is to be determined as of the end of such physical or economic useful life. In this contention, we believe that the Court of Appeals for the Ninth Circuit in *Evans v. Commissioner*, 264 F.2d 502, correctly held that under Section 23(1) of the Internal Revenue

Code of 1939, the language of applicable Treasury regulations, the consistent practice and position of the Commissioner over many years and the interpretation placed on the term "useful life" by decisions of the Tax Court extending over a long period, the useful life of a depreciable asset is its physical or economic life as opposed to measuring such life by the period during which such asset happened to be used in business by a particular taxpayer. We likewise rely on that portion of the excellent and very comprehensive opinion of the District Court dealing with this matter under the 1939 Code in *Hertz v. United States*, 165 F.Supp. 261, which case is now before the Court on the same question presented by Petitioner's case.

II.

The Government should not have been permitted to raise the issue of the definition of "useful life" and "salvage value" for the first time while this case was on appeal before the Fifth Circuit. From an examination of the pleadings in this case, including Petitioner's claim for refund, and the Commissioner's agent's report, it will be readily apparent that the case arose on the question of whether or not the company and rental cars in question were held primarily for sale or primarily for use in trade or business. After the District Court held that the cars were held primarily for use in trade or business and hence subject to long-term capital gains treatment under Section 117(j), following in substance the prior cases of *Latimer-Looney Chevrolet Company, Inc. v. Commissioner*, 19 T.C. 120 (1952); *Arthur L. Fields v. Granquist*, 134 F.Supp. 624 (D.C. Ore. 1955); *W. R. Stephens Co. v. Kelm*, 140 F.Supp. 12 (D.C. Minn. 1956); *Philber Equipment Corp. v. Commissioner*, 237 F.2d 129 (3rd Cir. 1956), the Government then injected its theory on appeal that even

though the company cars were held primarily for use in trade or business, they were not subject to an allowance for depreciation, since their useful life was one year, and the salvage value was substantially equivalent to the price received on their sale.

The Commissioner, in auditing Petitioner's returns for the two fiscal years involved in this case disallowed all of the depreciation shown on the returns with respect to the company cars in issue on the theory that the assets were inventoried property and not therefore as a matter of law subject to any allowance for depreciation.

As the case stood before the District Court, if the Court held from the facts that the cars were held primarily for use in trade or business for more than six months, then capital gains treatment would be allowed under Section 117(j), and the depreciation shown with respect thereto on Petitioner's original returns would be allowed. If, on the other hand, the Court had found that the cars were held primarily for sale or constituted inventory property, then there would be no capital gains allowable, and likewise no depreciation could be taken.

III.

Depreciation deductions for Federal income tax purposes are not subject to change due to fluctuation in the value of fixed assets. One of the major factors which apparently prompted or influenced the majority of the Fifth Circuit in this case to reverse the District Court's holding was the fact that in the aggregate Petitioner realized slightly more on the sale of all of the company cars in issue than they originally cost without regard to the depreciation claimed. This is an

undisputed fact, but Petitioner contends that mere fluctuation in market value, either upward or downward should not cause the loss of a depreciation deduction under Section 23(1) of the 1939 Code. Further, in this connection, the tax years involved in this suit are 1950 and 1951, and one of the principal reasons why the company and rental cars were resold at such an advantage was because of the Korean War and the unusual demand and short supply of cars.

IV.

The decision of the Fifth Circuit in this case will lead to unnecessary confusion and uncertainty in income tax matters involving questions of depreciation. The Fifth Circuit's holding that the term "useful life" means the useful life of a fixed asset in the hands of a particular taxpayer, will obviously add to the mounting confusion and uncertainty in Federal income tax matters. Obviously, there will be no objective guide which taxpayers can follow in establishing the useful life of depreciable assets and a proper rate or percentage of depreciation to be taken in filing their returns. The useful life, and hence the rate to be applied will, under the theory of the Fifth Circuit, be determined by the particular trade practices which happen to prevail from time to time in a taxpayer's trade or business. This, we submit, violates the traditional and long-standing concept and understanding of depreciation, and should be reversed.

ARGUMENT

I.

FOR PURPOSES OF COMPUTING DEPRECIATION WITH RESPECT TO PROPERTY USED IN TRADE OR BUSINESS UNDER SECTION 23(1) OF THE INTERNAL REVENUE CODE OF 1939 ON THE STRAIGHT-LINE METHOD, THE USEFUL LIFE TO BE USED IS THE PHYSICAL OR ECONOMIC LIFE OF SUCH ASSET AND ITS SALVAGE VALUE, IF ANY, IS TO BE DETERMINED AS OF THE END OF SUCH PHYSICAL OR ECONOMIC USEFUL LIFE.

First, we think it appropriate to review the history and circumstances under which the instant case arose. Massey Motors, Inc., and its wholly-owned subsidiary, Atlantic Motor Sales, Inc., used a number of automobiles from its new car inventory in the operation of its business as company and leased vehicles and, in so doing, the cars became property bona fidely used in the operation of the company's new car sales agency.

The company, in filing its corporate Federal income tax return for the calendar years 1950 and 1951, claimed depreciation with respect to the vehicles in question, utilizing an estimated useful life of three years, claiming a deduction with respect to all company cars for 1950 in the amount of $12,105.22 and $14,860.42 for 1951. During both of the calendar years in question, a number of the company cars were sold and, with respect to those held in service for more than six months, capital gains treatment was claimed under the provisions of Section 117(j) of the Internal Revenue Code of 1939.

The Commissioner, in causing the returns to be audited,

disallowed capital gains treatment on the theory that the company cars were stock in trade, rather than property used in trade or business, and were not, therefore, subject to any allowance whatever for depreciation and any gains realized with respect to the sale thereof constituted ordinary income and not capital gain. The position of the Commissioner is readily apparent from an examination of pages 2, 3, 4, 6 and 7 of Plaintiff's Exhibit 5 (R. 151-156). Massey Motors paid the deficiency as determined by the Commissioner on the basis of the 30-day letter, filed a claim for refund thereof, and in due course instituted a suit for refund in the United States District Court for the Southern District of Florida, Jacksonville Division.

Inasmuch as the Commissioner had assessed the deficiency on the theory that the company cars were inventory property and hence held primarily for sale, the case was tried in the District Court on this issue, namely, whether the company cars were used primarily for the operation of Petitioner's business, and incidentally for sale, or whether they were held primarily for sale and incidentally for use in the business. If the cars were held primarily for use in the business for more than six months, then under the express provisions of Section. 117(j) any gain realized from the sale thereof would be long-term capital gain and any loss would constitute an ordinary loss. The Commissioner's agent followed a consistent pattern in disallowing the depreciation claimed with respect to the cars in issue in toto, since under his theory the cars were inventory property and hence non-depreciable as a matter of law. In other words, the Commissioner in the first instance did not raise any issue as to definitions of the terms "useful life" and "salvage value" in connection with the depreciation issue, but simply disallowed these items in full on the legal premise that the cars were inventory property.

There was little or no testimony or other evidence introduced before the District Court when the case was tried relating to the question of depreciation. It was Petitioner's theory that if the District Court held that the cars were used primarily in business and were not held primarily for sale, then, as an automatic proposition of law, the depreciation claimed would be allowed and, likewise, the long-term gains claimed with respect to gains realized on the sale of some of these cars held for more than six months would be allowable.

The Government, in prosecuting its appeal, abandoned the issue as to whether or not the cars in issue were held primarily for sale or for use in the taxpayer's business, and to this extent accepted the findings of the District Court. Instead, the Government based its case on the theory that Petitioner was not entitled to any depreciation with respect to the vehicles on the grounds that inasmuch as the cars were admittedly kept in service for approximately one year, their useful life for purposes of computing any allowable depreciation was one year and not three years and that the salvage value properly assignable thereto was the amount received on the ultimate sale of the units. The Court of Appeals sustained the Government on this point with the minor exception that the case was remanded to the District Court with instructions to hear such evidence as might be appropriate to determine whether the salvage value should be the retail price received for the used units or their wholesale value, since Petitioner acquired the cars in the first instance on the wholesale market. Also, there was another minor issue in the case before the Courts below involving a question of Petitioner's taxability with respect to certain finance reserve holdbacks, which has now become academic by virtue of the

recent decision of this Court in *Commissioner v. Hansen*, 360 U.S. 446 (1959).

Although the instant case involves a relatively small sum, we think that the case is one of great importance to taxpayers in general, and involves the identical question presented in *Commissioner v. Evans*, No. 143, and *The Hertz Corporation v. United States*, No. 283, with respect to which all three cases certiorari was granted on October 12, 1959.

Although the three cases involve the identical question of law, the case of *Commissioner v. Evans* is more nearly akin to the problem presented than the case of *The Hertz Corporation v. United States*. Both the instant case and the *Evans* case involve an interpretation of Section 23(1) under the 1939 Code, and Treasury Regulations 111, Section 29.23(1), and both involve the identical tax years; whereas, the *Hertz* case arose under the 1954 Code, and for this reason, the Court may ultimately reach a different conclusion with respect to the issue presented, depending upon whether a case arose under the 1939 Code or the 1954 Code. As the Court is aware, both the *Evans* and *Hertz* cases involve only rental automobiles; whereas, the Petitioner's case involves both rental automobiles and company cars used in the operation of a retail automobile dealership, although the slight difference in underlying facts is wholly immaterial in so far as the ultimate legal conclusion is concerned. We think the Government will agree with this conclusion.

At the time that Petitioner's case was under consideration by the Fifth Circuit, the Ninth Circuit, in a unanimous decision in *Evans v. Commissioner*, 264 F.2d 502, decided January 26, 1959, reversed the decision of the Tax Court on the point here involved, and in effect held that under Sec-

tion 23(1) of the 1939 Code, the term "useful life" means the physical or economic life inherent in a depreciable asset for general business purposes by whomever used and that salvage value is the value at the end of such period, and refused to accept the Commissioner's theory that useful life for this purpose should be defined as the useful life measured by the particular taxpayer's use of the asset and that salvage value means the estimated proceeds which might be realized upon the disposition of the property. The Ninth Circuit in the *Evans* case also cited the decision of the District Court in Petitioner's case with approval.

Needless to say, Petitioner bases its case on the theory and rationale of the Ninth Circuit's opinion in the *Evans* case, and urges the Court to adopt such theory as controlling with respect to the issue involved in this case. We, therefore, do not think it necessary to attempt to paraphrase or condense the theory of the Ninth Circuit on brief.

We likewise believe that the District Court, in *Hertz v. United States,* 165 F.Supp. 261, correctly set forth the proper view of the law involving this issue as it relates to cases arising under Section 23(1) of the 1939 Code.

Inasmuch as Petitioner's case does not involve any taxable year arising under the 1954 Code or the Treasury Regulations issued thereunder, we do not think it proper that we attempt to address any of our remarks to the present state of the law.

We believe, however, that the Sixth Circuit erred in *Hertz Corporation v. United States,* 268 F.2d 604, in reversing the District Court by holding, in effect, that the term "useful life" for purposes of computing allowances for depreciation

for Federal income tax purposes has always meant the useful life of the assets in the hands of a particular taxpayer, both under the 1939 Code and the 1954 Code. We believe that whatever the state of the law under the 1954 Code, the term "useful life" under the 1939 Code meant the inherent physical or economic life of a depreciable asset. Therefore, we submit that the Ninth Circuit, in *Evans v. Commissioner*, correctly held that under Section 23(1) of the 1939 Code, the language of the applicable Treasury Regulations, Section 29.23(1), the consistent practice and position of the Commissioner over many years and the interpretation placed on the term "useful life" by decisions of the Tax Court extending over a long period, the useful life of a depreciable asset for Federal income tax purposes under the 1939 Code is its physical or economic life as opposed to measuring such life by the period during which such asset may be held for use in business by a particular taxpayer.

II.

THE GOVERNMENT SHOULD NOT HAVE BEEN PERMITTED TO RAISE THE ISSUE OF THE DEFINITION OF "THE USEFUL LIFE" AND "SALVAGE VALUE" FOR THE FIRST TIME ON APPEAL.

An examination of the Complaint, Claims for Refund filed herein (R. 1-12), the Government's Answer (R. 13-15), the Agent's Report (R. 151-156) will show that there was no issue raised by the Government with respect to the definition of "useful life" or "salvage value" in connection with the cars in issue. Plaintiff's case before the Trial Court was presented on the theory that the Government took the position that all the cars were held primarily for sale and hence not entitled to capital gains treatment under Section 117(j) of

the 1939 Code and that no depreciation in any amount was allowable. Since this was the Government's express theory from the time the Examining Agent questioned Petitioner's return, the Government first squarely raised the issue presented in this case in filing its brief before the Court of Appeals for the Fifth Circuit.

This factor led Petitioner to take the position before the Court of Appeals that the Government had no right to raise the issue involved in this case for the first time on appeal and that inasmuch as the Government had acquiesced in the trial court's holding that the cars were bona fidely used in the operation of Petitioner's trade or business, the decision of the trial court should be affirmed and the case disposed of in the same manner as the other substantially identical cases, including the leading Tax Court case of *Latimer-Looney Chevrolet, Inc., v. Commissioner*, 19 T.C. 120 (1952).

The Fifth Circuit held, in effect, that insofar as the claims for refund mentioned the fact that the depreciation had been disallowed, this was sufficient to permit the Government to raise the issue involved. This we think was an inequitable and erroneous conclusion, and should be reversed.

Counsel for Petitioner also tried an identical company car case in *Duval Motor Company v. Commissioner*, 28 T.C. 42, (1957), in which the Commissioner had denied capital gains treatment and depreciation with respect to a Ford dealer's company cars, which action the Tax Court sustained. Duval Motor Company appealed from the adverse decision of the Tax Court to the Court of Appeals for the Fifth Circuit, which affirmed the decision of the Tax Court in *Duval Motor Company v. Commissioner*, 264 F.2d 548. Both the *Duval* and *Massey* cases were argued before the Court at the same time.

In the *Duval Motors* case, the Commissioner had disallowed depreciation in its entirety on the theory that the company cars constituted inventory property held primarily for sale. If the Tax Court had found that the *Duval Motors* company cars were held primarily for use in the taxpayer's business, then the taxpayer would have been entitled to capital gains treatment on the gains realized from the sale of the cars and the depreciation claimed on its original returns would have been allowed. *Duval Motors* claimed depreciation on its company cars on a straight-line method, using an estimated useful life of four years, without any salvage value. The company's practices with respect to disposing of company cars after they had been operated for a specified number of miles or Ford introduced a new model was precisely the same as the trade practices followed by Massey Motors, Inc. There was no issue raised in the *Duval Motors* case with respect to the definition of useful life and salvage value, as in the instant case. In fact, the Commissioner conceded before the Tax Court that *Duval Motors* was entitled to depreciation and capital gains on a number of its company cars and service vehicles.

This then placed us in the somewhat peculiar position of having two identical tax cases, one tried in the Tax Court and one in the District Court involving the identical issue and substantially identical facts, with one trial court holding that the company cars were held primarily for sale and the other trial court holding that the company cars were held primarily for use in the taxpayer's business. The Government acquiesced in the District Court's decision that the cars in the instant case were held primarily for use in trade or business, but, at the same time, raised an issue with respect to the definition of the term "useful life" when the case was on appeal, with the result that both cases were lost.

The Commissioner apparently discovered that he was attacking capital gains treatment under Section 117(j) of the 1939 Code with respect to automobile dealers' company and rental cars on the wrong theory and it was not, in so far as we know, until the appeal in the instant case and the decision of the Ninth Circuit in *Evans v. Commissioner* and the decision of the District Court in *Hertz v. United States* that the Commissioner for the first time sought to invoke his radical and unorthodox theory that useful life for purposes of computing depreciation deductions for Federal income tax purposes means the useful life of a depreciable asset in the hands of a particular taxpayer, rather than the inherent physical life of such an asset. We think, therefore, that it can be fairly stated that the Government's position in the instant case is in the nature of an afterthought, and should not be sustained, at least with respect to cases arising under the 1939 Code.

One of the chief difficulties with the decision of the Fifth Circuit is that in order to reach the result that the majority of the Court did with respect to the definition of useful life, it was necessary to in effect, invalidate, in part the Treasury Regulations in force during the calendar years 1950 and 1951 issued pursuant to Section 23(1) of the 1939 Code.

Treasury Regulations 111, Section 29.23(L), provide "the proper allowance for such depreciation is that amount which should be set aside for the taxable year, in accordance with their reasonably consistent plan (not necessarily at a uniform rate), whereby the aggregate of the amounts so set aside, plus the salvage value, will at the end of the *useful life of the depreciable property*, equal the cost or other basis of the property--."

The same Regulations, at Section 29.23(5), dealing with

the method of computing depreciation allowance, states:

> "The capital sum to be recovered shall be charged off over *the useful life of the property*, either in equal annual installments or in accordance with any other recognized trade practice, such as an apportionment of the capital sum over units of production."

The Ninth Circuit, in the *Evans* case and the District Court in the *Hertz* case, found that these Regulations made it clear that the Treasury was defining useful life as meaning the inherent physical or economic life of an asset in the hands of taxpayers in general.

As we understand the law, a Treasury Regulation, such as the one issued under Section 23(1) of the 1939 Code, has the force and effect of the statutory law itself.

We, therefore, submit that the Commissioner, whether advertently or inadvertently, by amending his regulations under Section 23(1) in 1942, placed himself in a position whereby the term "useful life" for the purposes in question meant physical or economic life of a depreciable asset.

The Court of Appeals, in discussing the 1942 amendment to the regulations states (R. 139): "A cursory look at the legislative history back of this amendment clearly demonstrates that there was no purpose to express a change in what was meant by useful life." And the Court goes on to explain why the regulations were amended.

We, frankly, do not know what the Court meant by the legislative history of the 1942 amended regulations. In so far as Counsel knows, there is no such thing as legislative history of a Treasury Regulation, and that the regulations must

be construed as they appear in final form. There is no published legislative history of Treasury Regulations akin to Committee Reports published while Congress is considering amendments to the Internal Revenue Code or other Federal Statutes, as an aid in statutory construction.

The majority of the Court of Appeals, in commenting (R. 139) on the Treasury Regulations issued pursuant to 1954 Code, stated: "Thereafter, when the 1954 Internal Revenue Code was adopted, without any change in the depreciation section of the law, the Treasury promulgated the regulations under it." The Court went on to quote the sections of the present regulations issued under Section 167 of the 1954 Code, defining for the first time salvage value and also defining useful life as the life in a particular taxpayer's trade or business.

In this connection, we would like to point out that it is not accurate to say that the 1954 Code was adopted without any change in the depreciation section of the law.

We would like to suggest to the Court that even a cursory comparison of Section 23(1) of the 1939 Code with Section 167 of the 1954 Code will show that there are a great many differences with respect to the depreciation sections. For example, the 1954 Code for the first time expressly authorized the use of the sum of the digits and declining balance method of computing depreciation, and the accelerated methods obviously prompted Congress to give consideration to matters of salvage value and useful life. Section 167 of the 1954 Code for the first time mentioned the term "useful life", although the term is without definition, and it is the lack of any such definition, either in the 1939 Code or 1954 Code which causes the difficulty involved in the present litigation.

The Court of Appeals also cites the decision of this Court in *United States v. Ludey*, 274 U.S. 295, as determinative of the question of definition of useful life.

The *Ludey* case was decided by the Court in 1927 and an examination of the opinion of Mr. Justice Brandeis will show that the case did not involve a question of the definition of the terms "useful life" or "salvage value". In fact, we think that the *Ludey* case clearly supports the instant petitioner's contentions. The case involved a question of whether or not in determining gain or loss upon the sale of oil mining equipment and oil reserves in 1917, the cost thereof should be reduced by the aggregate amounts of depreciation and depletion, which the taxpayer was entitled to deduct in years prior to sale, though not deducted on the returns for prior years. It appeared that the taxpayer in this case had certain oil mining properties originally costing $95,977.33 and which were sold in 1917 at a price of $81,200.00. The Commissioner, in computing the gains realized on the sale by the taxpayer, deducted from the original cost of the assets $10,465.16 on account of depreciation of the equipment and $32,258.81 on account of depletion reserves through the taking out of oil by the taxpayer after March 1, 1913.

The taxpayer insisted that with respect to depreciation the property was, as a matter of law, unchanged in character and quantity throughout the period of operation and that his basis for gain or loss should not be reduced so as to increase his gain.

The Court held that the Revenue Acts should be construed as requiring deductions for both depreciation and depletion when determining the original cost of the oil property sold. The Court was holding that depreciation is allowed

or allowable and that the basis of a depreciable asset would have to be adjusted downward whether or not the taxpayer had in fact claimed depreciation deductions in prior years or had received any tax benefit with respect thereto.

The opinion does go on to explain the general concept of depreciation and, among other remarks, states "the depreciation charge permitted as a deduction from the gross income in determining the taxable income of a business for any year, represents a reduction during the year of the capital assets through wear and tear of the plant used. The amount of allowance for depreciation is the sum which should be set aside for the taxable year, in order that, at the end of the useful life of the plant in the business, the aggregate of the sum set aside will (with the salvage value) suffice to provide an amount equal to the original cost."

It is apparently this incidental general language which the Court of Appeals in the present case considered as determinative of the question involving the definition of useful life. It is difficult for us to follow this reasoning, in view of the fact that the *Ludey* case did not involve any question of the definitions of "useful life" or "salvage value" and, in fact, it was expressly stated that there was no dispute between the parties as to the method of computation employed by the Bureau of Internal Revenue.

We believe that the present case, together with the related *Evans* and *Hertz* cases, are the first cases to come before this Court requiring specifically the definition of "useful life" and "salvage value" for the purposes in question.

The Fifth Circuit in its opinion (R. 140) cites the Treasury's Bulletin F as supporting its theory that the Commissioner

has always taken the position that useful life means the life of a depreciable asset in the hands of a particular taxpayer. The Ninth Circuit in the *Evans* case reaches a diametererically opposed conclusion, and several pages of the opinion are devoted to an excellent discussion of this point.

Bulletin F, as the Court may know, was published by the Treasury Department in 1931 and revised in 1942, as an objective aid to taxpayers in computing depreciation for Federal income tax purposes by establishing a published guide as to what the Commissioner would consider as a reasonable estimated useful life for purposes of computing depreciation.

This Bulletin is conveniently reproduced in all major Tax Services, including the Commerce Clearing House Standard Federal Tax Reporter for the year 1960 in Volume 2, at paragraphs 1776 to 1777.395.

In connection with automobiles, Bulletin F states at page 52 that the recommended estimated useful life for passenger cars is five years, and for salesman cars, three years, when used by commercial enterprises other than public utilities and construction. The petitioner in the instant case elected to use three years as the useful life and one of the permissive lives set forth in Bulletin F.

We urge the Court, if possible, to examine Bulletin F in general, and we think that any objective examination of this publication will compel the conclusion that the Commissioner defined useful life for the purposes in question as the general inherent economic or physical life of depreciable assets as compared with the useful life of such an asset in the hands of a particular business or individual.

III.

DEPRECIATION DEDUCTIONS FOR FEDERAL INCOME TAX PURPOSES ARE NOT SUBJECT TO CHANGE DUE TO FLUCTUATIONS IN THE VALUE OF FIXED ASSETS.

We recognize that one of the chief difficulties with petitioner's case on its own facts is that the cars in question in the aggregate were sold for more than their original cost without regard to depreciation. However, we construe the *Ludey* case as requiring petitioner to take depreciation on these cars which were on hand at the end of any particular taxable year, once it was concluded that the cars were property held primarily for use in trade or business, without regard to fluctuations in market value.

As we understand it, depreciation is primarily an accounting concept. As an accounting concept, depreciation is allowed or allowable for Federal income tax purposes without regard to fluctuations in price level. We know of no authority which would deny a taxpayer the right to depriciate property used in trade or business or in the production of income, notwithstanding the fact that the property may have appreciated in value in excess of original cost.

For example, the Court well knows that a taxpayer may have purchased a large office building in 1933, at a very low cost, upon which depreciation would be allowed based on an estimated useful life of thirty or perhaps as long as forty years, and that the taxpayer, in filing his return for 1960, will be entitled to this depreciation, notwithstanding the fact that the building may be worth five times its original 1933 acquisition cost. Also, if the taxpayer in 1960 should in fact sell the real estate for many times its original cost, the gain real-

ized would be taxable as a long-term capital gain, under the provisions of Section 1231 of the 1954 Code and its predecessor, Section 117(j) of the 1939 Code.

We believe that the Court of Appeals in the instant case was unduly influenced in its decision by the undisputed fact that during the calendar years 1950 and 1951, petitioner was selling some of the company and leased cars at prices in excess of the original cost after approximately one year of company or lease service. The case is perhaps a classic example of the old maxim that a hard case makes bad law.

We think it is fair comment to point out that one of the reasons why petitioner was able to sell the cars as it did in 1950 and 1951 was the result of extremely favorable market conditions growing out of the Korean War, and we daresay that very few, if any, automobile dealers today can sell a company car after one year of service for anything even approaching its original cost.

There have been a number of Tax Court cases which have held that a depreciation deduction cannot be disallowed merely by reason of the price received for the article, without consideration of other factors. We know of no other direct authority on this point, except as cited herein. Perhaps, the most important of these cases is *Wier Long Leaf Lumber Co. v. Commissioner*, 9 T.C. 990 (1947), which was reviewed by the Fifth Circuit and modified on other grounds at 173 F.2d 549. The findings of fact of the Tax Court show that in 1942 the petitioner sold three automobiles which had cost $2,854.85 and had a depreciation reserve of $1,148.39 accumulated to January 1, 1942, and that petitioner, in its tax return for 1942, deducted $1,047.53 as a reasonable allowance for depreciation on the cars.

The Commissioner, in auditing the return, allowed as a deduction the sum of $592.94 on the theory that the depreciation was reduced, so that the net book value would be equal to the sales price and no gain or loss would result. The depreciation taken by petitioner was 40 per cent per annum. The Tax Court in effect held that the Commissioner could not readjust the depreciation allowance merely because of price received on the sale of the article. It should be noted that the car was sold in 1942 after commencement of World War II and obviously the increased price for used cars during this time was a factor which permitted the company to make a favorable sale of the three used cars. Petitioner's situation was likewise influenced by the Korean War.

There are a number of other cases which hold that the mere appreciation in value due to extraneous causes has no influence on depreciation allowances one way or the other. *Even Realty Co.*, 1 B.T.A. 355, *Seaton Falls Realty Co.*, 6 B.T.A. 883, *Max Eichenberg*, 16 B.T.A. 1368, and *Thomas Goggan & Bro.*, 45 B.T.A. 218.

It was also held in *Louis Titus*, 2 B.T.A. 754, that "in determining the annual depreciation to be allowed, consideration cannot be given to the fluctuations in cost or value of the asset which may take place from year to year owing to market conditions." We take this to mean that a taxpayer is not entitled to accelerate its customary rate of depreciation merely because the market value of a depreciable asset goes down in a particular year, nor should a taxpayer be denied the right to his customary rate, simply because the market value for a particular depreciable asset or group of assets has tended to remain constant for a particular year or risen slightly in value as compared to the taxpayer's cost. The Court can readily see the complete hiatus that the matter

of depreciation will be in if taxpayers are permitted or required to adjust their rates of depreciation to reflect upward or downward trends in price level. It is elementary that income taxes are computed on the basis of an annual accounting period, and once the method of depreciation is selected and the rate established, assuming it to be reasonable, it must be adhered to, nothwithstanding fluctuations in price level, either upward or downward.

One of the most unfortunate features of our present Federal income tax structure is the great amount of uncertainty which has been prompted to some measure by the way in which many of the provisions of the present Code have been enacted by Congress and also by the over-zealous manner in which the laws have been administered by the Internal Revenue Service, both at the administrative level and before the Courts. The present case is an excellent example of this unfortunate condition. If the Court supports and ratifies the Government's claim that "useful life" means the life of a depreciable asset as used in a particular taxpayer's business, then there will be no certainty whatever available as a guide to taxpayers in general in selecting an estimated useful life for purposes of computing their annual allowance for depreciation. In this connection, Bulletin F may as well be scrapped in its entirety.

IV.

THE DECISION OF THE FIFTH CIRCUIT IN THIS CASE WILL INJECT UNNECESSARY CONFUSION AND UNCERTAINTY IN THE INCOME TAX MATTER RELATIVE TO DEDUCTIONS FOR DEPRECIATION.

As the Court can readily appreciate, the issue involved in

this case and the *Evans* and *Hertz* cases is of considerable importance to taxpayers in general, and is in no manner limited or confined to automobile dealer and rental car companies.

If the Court should agree with the Government's theory, then many taxpayers will be able to gain excessive depreciation deductions as a result of establishing a history or pattern of using depreciable fixed assets for periods considerably less than their true economic or physical life. For example, a company engaged in manufacturing might purchase certain heavy machinery that normally would carry an estimated useful life of ten years, and commence disposing of such equipment at the end of five or perhaps six years. By varying the business practice, the useful life of such equipment would become five or six years instead of ten years. The statute of limitations would in most cases prevent the Government from readjusting such depreciation in years not open for examination, and gains realized on the sale or other disposition of such property would be taxable as long-term capital gain under Section 1231 of the 1954 Code.

If the Government's theory that useful life means the life of an asset in a particular taxpayer's business as opposed to its inherent physical life, then the Government might reduce the adjusted basis of such asset for purposes of computing gain or loss on its sale under the theory that the taxpayer had not depreciated the item rapidly enough because it had used an estimated useful life of fifteen years when business practices showed that it should have been ten years.

The Government's theory should it prevail will increase to a considerable measure the confusion and bickering in connection with Federal income tax matters for years to come, both from the standpoint of a taxpayer seeking a tax advantage and the Government seeking to extract additional taxes.

In further support of our contention that the Government's position in this case is an afterthought, we would like to call the Court's attention to the decision of the Court of Appeals for the First Circuit in *Philber Equipment Corp. v. Commissioner*, 237 F.2d 129, decided September 27, 1956, reversing a decision of the Tax Court, 25 T.C. 88 (1955).

The Philber Equipment Corporation, a Pennsylvania corporation, was in the business of owning and leasing trucks and other vehicles and followed the practice of disposing of such units after approximately one year of service in more or less the same manner as the petitioner and the taxpayers in the *Evans* and *Hertz* cases.

The Commissioner in attacking the capital gains claimed on profits realized from the sale of these used rental vehicles proceeded on the theory that no capital gains were allowed under Section 117(j) on the theory that the vehicles at the time of disposition were held primarily for sale and hence did not qualify under this Section.

It is interesting to note that the Tax Court's opinion written by Judge Raum made a specific finding of fact that each of the units involved were held by the petitioner for a period in excess of six months and was subject to an *allowance for depreciation*.

The Tax Court upheld the Commissioner's determination and was reversed by the Third Circuit, so that the taxpayer ultimately prevailed on the capital gain issue for the years involved, which were incidentally the two fiscal years ended June 30, 1951 and 1952.

Thus, we see that the Commissioner was not then contending that Philber Equipment Corporation was not entitled to

depreciation on the units on the theory that the "useful life" of the property was one year and "salvage value" was equal to the amount realized on the sale of the units. The Court will appreciate that in cases of this kind, the tax consequences insofar as the taxpayer is concerned will be identical whether capital gains treatment under Section 117(j) is denied or depreciation is disallowed on the theory that the "useful life" of the units is one year, and the "salvage value" is equal to the amount received on this sale.

We think it fair comment to point out that the Government has never been sympathetic to Section 117(j) which was enacted as a remedial statute by Congress as a part of the Revenue Act of 1942.

Apparently, the reason for the enactment of the statute was that prior to its effective date, gains realized on the sale of depreciable property used in trade or business constituted ordinary income regardless of the holding period. Many taxpayers were reluctant to sell depreciable property which had been acquired during the depression years and which had increased in value because of the World War II, when they were faced with ordinary income as opposed to capital gain.

Apparently, Congress in an effort to correct this situation and prompt taxpayers to dispose of fixed assets which they were not using during the war period enacted Section 117(j) to give capital gains treatment on gains realized from the sale of this type of asset, and at the same time, provided that if a Section 117(j) asset is sold at a loss, the taxpayer has an ordinary loss and not a capital loss.

This statute then always operates in the taxpayer's favor. If he has a gain, it is a long-term capital gain. On the other hand, if he has a loss, the loss is an ordinary loss.

If the Government ultimately prevails in this case, it will be in a position to abrogate for all practical purposes the normal operation of Section 117(j) of the 1939 Code and its counterpart Section 1231 of the 1954 Code. This would follow, because the Government will be in a position to attack any capital gain realized under Section 117(j) by, in effect, adjusting the taxpayer's prior deductions for depreciation on the grounds that the "useful life" of the asset was the time during which the asset was held by the taxpayer, and that its "salvage value" should be substantially equal to the amount realized on the sale.

This would be particularly true of depreciable assets which are readily salable such as automobiles.

If the Commissioner feels that over the long range, the tax results which would follow if the District Court's decision were sustained are undesirable, then he ought to approach Congress for a statutory amendment to those sections of the Code dealing with depreciation and capital gains or losses on the sale of such assets, rather than seeking a judicial determination to this effect, and which if adopted; will reverse long-standing business practices on a completely inequitable and retroactive basis. Also, as we have stated above, the Commissioner's theory will necessarily inject a great deal of uncertainty and confusion in those areas of Federal income tax law and practice involving depreciation. It would seem unwise for the Government to attempt to inject this element of uncertainty because of several isolated cases which give rather unusual tax results due primarily to price level increases caused by the Korean War.

CONCLUSION

Based upon the foregoing, it is respectively submitted that the decision of the majority of the Court of Appeals for the Fifth Circuit is in error, and the Court should adopt the theory of the Ninth Circuit in *Evans v. Commissioner* that the definition of useful life for purposes of computing allowances for depreciation for Federal income tax purposes under the Internal Revenue Code of 1939 for the calendar years 1950 and 1951 means the inherent physical or economic life of such asset and that salvage value is to be determined at the end of such life. We, therefore, urge the Court to reverse the majority decision of the Fifth Circuit and remand the case to the District Court for a proper determination of the salvage value to be assigned to the vehicles in question at the end of their physical or economic life.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that four (4) copies of the foregoing Brief have been served on opposing counsel, The Honorable J. Lee Rankin, Solicitor General of the United States, by mail at his last known mailing address, Department of Justice, Washington 25, D. C., on this 22nd day of January, A. D. 1960, in accordance with Rule 33 of the Rules of the Supreme Court of the United States.

DATED this 22nd day of January, A. D. 1960.

James P. Hill
Counsel for Petitioner

APPENDIX A

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME

In computing net income there shall be allowed as deductions:

* * * *

(1) [as amended by Sec. 121(c) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

* * * *

(26 U.S.C. 1952 ed., Sec. 23.)

Internal Revenue Code of 1939:

SEC. 117. CAPITAL GAINS AND LOSSES

(j) Gains and Losses from Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.--

(1) Definition of Property Used in the Trade or Business.--For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in Section 23(1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the

taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. Such term also includes timber with respect to which subsection (k) (1) or (2) is applicable.

(2) General Rule.--If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For the purposes of this paragraph:

(A) In determining under this paragraph whether gains exceed losses, the gains and losses described therein shall be included only if and to the extent taken into account in computing net income, except that subsections (b) and (d) shall not apply.

(B) Losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business, or capital assets held for more than 6 months shall be considered losses from a compulscry or involuntary conversion.

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.23(1)-1. *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business, or treated under section 29.23(a)-15 as held by the taxpayer for the production of income, may be deducted from gross income. For convenience such an allowance will usually be referred to as depreciation, excluding from the term any idea of a mere reduction in market value not resulting from exhaustion, wear and tear, or obsolescence. The proper allowance for such depreciation is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the useful life of the depreciable property, equal the cost or other basis of the property determined in accordance with section 113. Due regard must also be given to expenditures for current upkeep. * * *

SEC. 29.23(1)-2. *Depreciable Property.*—The necessity for a depreciation allowance arises from the fact that certain property used in the business, or treated under section 29.23(a)-15 as held by the taxpayer for the production of income, gradually approaches a point where its usefulness is exhausted. The allowance should be confined to property of this nature. In the case of tangible property, it applies to that which is subject to wear and tear, to decay or decline from natural causes, to exhaustion, and to obsolescence due to the normal progress of the art, as where machinery or other property must be replaced by a new invention, or due to the inadequacy of the property to the growing needs of the busi-

ness. It does not apply to inventories or to stock in trade, or to land apart from the improvements or physical development added to it. It does not apply to bodies or minerals which through the process of removal suffer depletion, other provisions for this being made in the Internal Revenue Code. (See sections 23(m) and 114). Property kept in repair may, nevertheless, be the subject of a depreciation allowance. (See section 29.23(a)-4). The deduction of an allowance for depreciation is limited to property used in the taxpayer's trade or business, or treated under section 29.23(a)-15 as held by the taxpayer for the production of income. No such allowance may be made in respect of automobiles or other vehicles used solely for pleasure, a building used by the taxpayer solely as his residence, or in respect of furniture or furnishings therein, personal effects, or clothing; but properties and costumes used exclusively in a business, such as a theatrical business, may be the subject of a depreciation allowance.

* * * *

SEC. 29.23(1)-4. *Capital Sum Recoverable Through Depreciation Allowances.*—The capital sum to be replaced by depreciation allowances is the cost or other basis of the property in respect of which the allowance is made. (See sections 113(a) and 114.) To this amount should be added from time to time the cost of improvements, additions, and betterments, and from it should be deducted from time to time the amount of any definite loss or damage sustained by the property through casualty, as distinguished from the gradual exhaustion of its utility which is the basis of the depreciation allowance. (See section 113(b).) * * *

SEC. 29.23(1)-5 *Method of Computing Depreciation Allowance.*—The capital sum to be recovered shall be charged off over the useful life of the property, either in equal annual installments or in accordance with any other recognized trade practice, such as an apportionment of the capital sum over units of production. Whatever plan or method of apportionment is adopted must be reasonable and must have due regard to operating conditions during the taxable period. The reasonableness of any claim for depreciation shall be determined upon the conditions known to exist at the end of the period for which the return is made. If the cost or other basis of the property has been recovered through depreciation or other allowances no further deduction for depreciation shall be allowed. The deduction for depreciation in respect of any depreciable property for any taxable year shall be limited to such ratable amount as may reasonably be considered necessary to recover during the remaining useful life of the property the unrecovered cost or other basis. The burden of proof will rest upon the taxpayer to sustain the deduction claimed. Therefore, taxpayers must furnish full and complete information with respect to the cost or other basis of the assets in respect of which depreciation is claimed, their age, condition, and remaining useful life, the portion of their cost or other basis which has been recovered through depreciation allowances for prior taxable years, and such other information as the Commissioner may require in substantiation of the deduction claimed.

A taxpayer is not permitted under the law to take advantage in later years of his prior failure to take any depreciation allowance or of his action in taking an allowance plainly inadequate under the known facts in prior years. * * *